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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1973 NO. 73- 737

UNITED STATES OF AMERICA

-v-

JOSEPH ESPOSITO, Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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SUMMARY INDEX

	PAGE
TABLE OF CASES	iii
DISCUSSION OF LOWER COURT OPINIONS	1
JURISDICTIONAL STATEMENT	4
STATEMENT OF QUESTIONS PRESENTED	6
SUMMARY OF FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	8
STATEMENT FOR THE BASIS FOR ORIGINAL JURISDICTION	10
STATEMENT OF THE CASE	12
ARGUMENT	
I. NONE OF THE AUTHORITY SUBMITTED BY THE LOWER COURTS OR THE GOVERNMENT ACUTALLY TOUCHES THE ISSUE HERE IN CONTENTION	25

PAGE

ARGUMENT (Continued)

II. THE GREATLY EXPANDED USE OF TAPE RECORDINGS NECESSITATED BY THE USE OF ELECTRONIC SURVEILLANCE UNDER TITLE III OF THE 1968 OMNIBUS CRIME CONTROL AND SAFE STREETS ACT MAKES IT IMPERATIVE FOR THIS COURT TO SET STRICT GUIDELINES INSURING THE FAIR USE OF SUCH MATERIAL 28

III. IT IS A DENIAL OF DUE PROCESS TO EXPOSE THE JURY TO A TRANSCRIPT OF RECORDED CONVERSATIONS WHERE THAT TRANSCRIPT CONTAINS CONVERSATIONS INAUDIBLE UNDER THE PRECISE CONDITIONS UNDER WHICH THE RECORDINGS ARE TO BE PRESENTED TO THE JURY 29

ARGUMENT (Continued) PAGE

IV. OBJECTIONS TO THE TEXT OF A TRANSCRIPT MUST BE SETTLED BY A PRE-TRIAL HEARING DURING WHICH THE TRIAL COURT CAN STRIKE ANY POR-TIONS OF THE PROFFERED TRANSCRIPT WHICH DO NOT REFLECT THE AUDI-BLE PORTIONS OF THE TAPE RECORDING AND INTRODUCTION OF SUCH INACCURATE TRANSCRIPTS SUBJECT TO LATER CAUTIONARY INSTRUCTIONS IS AN INHERENT DENIAL OF DUE PROCESS 30

V. A PROSECUTOR DENIES THE DEFENDANT'S RIGHT TO A FAIR TRIAL WHEN HE DELIBERATELY EXPOSES THE JURY TO TRANSCRIPTS OF TAPE RECORDINGS WHICH DO NOT CONFORM WITH THE ACTUAL CONVERSATIONS AUDIBLE TO THE JURY WHEN PLAYED IN THE COURTROOM 31

DISTRICT COURT ORDER 33

JUDGMENT ORDER OF THE THIRD CIRCUIT COURT OF APPEALS 34

	PAGE
TRANSCRIPT OF PROSECUTION AND DEFENSE VERSIONS OF THE MARCH 13, 1972 CONVERSATION	39
AFFIDAVIT OF SERVICE	45

TABLE OF CASES

Brody v. Maryland
373 U.S. 83(1963) 32

Bruton v. United States
391 U.S. 123 (1968) 31

United States v. Carson
464 F2d 424 (2 Cir., 1972) 26

Fountain v. United States
(5 Cir., 1967) 348 F2d 624 26

Gonzales v. United States
314 F2d 750 (9 Cir., 1963) 26

United States v. Hall
342 F2d 849 (4Cir., 1965) 26

Leary v. United States
395 U.S. 6 (1969) 29

United States v. Koska
(2 Cir., 1967) 443 F2d 1167 . . . 26

United States v. Schanemman
150 F2d 941 (3Cir., 1945) 26

DISCUSSION OF LOWER COURT'S OPINION

After a jury finding of guilty on each of the two counts of Petitioner's Indictments on February 8, 1973, Petitioner's counsel filed Motions for New Trial and for Judgment of Acquittal in the District Court. The Motions reasserted the same two points of reversible error which the defendant relied upon at trial: (1) Introduction of evidence of criminal activity after the date of the wrongdoing which was charged in the Indictment; (2) Failure of the Trial Court to rule certain inaudible tape recordings to be inadmissible.

By an Order without Opinion, dated March 12, 1973 (see page 33,

infra), HONORABLE CLARENCE H. NEWCOMER denied both the Motion for New Trial and Judgment of Acquittal.

Following Judgment of Conviction and sentencing of March 26, 1973, Petitioner's counsel filed Notice of Appeal with the Third Circuit. After oral argument on September 5, 1973, a three-Judge panel of the Third Circuit Court of Appeals, affirmed the judgment of conviction and sentence by Judgment Order dated September 7, 1973 (see page 34 , infra). The Judgment Order drafted by the HONORABLE FRANCIS L. VAN DUSEN, reasoned that evidence of criminal activity by the defendant subsequent to the misconduct for which he was charged was properly admissible as

probative of intent, plan, scheme or design; and the Opinion justified the admission of clearly inaudible tape recordings (buttressed by detailed Secret Service transcripts which could have only resulted from pure speculation as to the contents of the tape recordings at issue). On the theory that defense counsel had the option to further cross-examining the Secret Service agents as to the manner by which they divined the contents of the inaudible tape recordings, or to present an equally specious transcript for presentation to the jury on behalf of the defendant.

JURISDICTIONAL STATEMENT

The Petitioner is herein seeking Certiorari to the Third Circuit Court of Appeals in order to have the judgment of that Court, dated September 7, 1973, reviewed. Although the time for filing Petition for Certiorari, under the Rules of the United States Supreme Court ended on October 6, 1973, Petitioner's newly-appointed counsel made timely Motion for a thirty-day extension in which to seek Certiorari. JUSTICE WILLIAM BRENNAN, by Order dated October 17, 1973, extended the due date for Certiorari Petition to November 5, 1973.

Jurisdiction for Certiorari rests

upon 28 U.S.C.A., Section 1254(1) wherein the Supreme Court's jurisdiction on Appeal is stated thus:

> "Section 1254. Courts of Appeals; certiorari; appeal; certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF QUESTIONS PRESENTED

Whether it is a denial of due process for a Trial Judge to admit into evidence completely inaudible conversations, and whether exposure of the jury to such evidence, wholly lacking in probative value, can be justified by: (1) permitting the Government to submit to the jury a fanciful, yet highly inculpatory "transcript" of tape recordings which were so indeciperable that no technical process could discern human conversation in them, or (2) inviting defense counsel to prepare an equally biased "transcript" so that the defendant would have an equal opportunity to capture the jury's imagination (as

the Third Circuit Court of Appeals suggested at page 3 of its Judgment Order dated September 7, 1973), or (3) permitting the jurors to speculate without inhibition as to the contents of the static and noise which the Government proffered as a conversation of the defendant.

SUMMARY OF FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Petitioner contends that the Trial Court's ruling permitting the jury to listen to and deliberate upon incomprehensible evidence necessarily required the fact-finder to make an unreasonable and speculative inference as to the import of the transcript at issue. Such an unreasonable inference is a violation of the Fifth Amendment to the United States Constitution, which reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life

or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use, without just compensation. (Emphasis added).

STATEMENT FOR THE BASIS FOR
ORIGINAL JURISDICTION

The defendant, JOSEPH ESPOSITO, was prosecuted in the United States District Court for the Eastern District of Pennsylvania, because of his alleged violation of 18 U.S.C.A. Sections 472, 473, which statutes respectively prohibit knowing, fraudulen possession of counterfeit currency and transfer of such currency with intentions to pass, publish or defraud. The sections read:

> "Section 472. Uttering counterfeit obligations or securities
>
> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely

made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000.00 or imprisoned not more than fifteen years, or both.

Section 473. Dealing in counterfeit obligations or securities

Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published or used as true and genuine, shall be fined not more than $5,000.00 or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

Petitioner, JOSEPH ESPOSITO, was charged (Indictment No. 72-348, May 24, 1972) with having sold counterfeit U.S. Currency bearing a face value of $25,000.00 to a man named CHARLES CARDONICK on March 13, 1972, between 7:00 P.M. and 8:00 P.M. in Philadelphia, Pennsylvania. Whether ESPOSITO did, in fact, transfer the counterfeit notes, as charged in the Indictment, is, of course, the ultimate fact upon which a determination of guilt or innocence turns; therefore, the prosecution of this entire criminal action should involve only facts pertinent to the defendant's conduct between 7:00 P.M. and 8:00 P.M., Monday, March 13, 1972, when

the Petitioner and MR. CARDONICK were together for the alleged sale of the spurious Federal Reserve Notes.

At trial, evidence introduced by the prosecution, which was relevant to the precise criminal act charged in the Indictment - sale of $25,000.00 in counterfeit Federal Reserve Notes at 7:30 P.M. or March 13, 1972 - was clearly insufficient to support a finding of guilt. The only direct evidence of guilt arose in the testimony of CHARLES CARDONICK. This informant testified that he had first met the defendant in the early sixties when the two young men were teenagers vacationing on the Jersey shore. According to CARDONICK, their relation-

ship then was casual and they had no further contact with each other for almost a decade until the afternoon of March 7, 1972 when the informant was assigned to probation counselor, JOSEPH ESPOSITO, the Petitioner, for supervision of the balance of a ten-year probationary sentence to which CARDONICK was subjected after being found guilty of forgery in Philadelphia Common Pleas Court.

The informant testified that Petitioner, JOSEPH ESPOSITO, had been assigned as his probation counselor after CARDONICK'S previous counselor was convicted of soliciting bribes. After a cordial meeting and recollection of teenage bribes in Atlantic

City, CARDONICK testified, the Petitioner immediately broached the subject of counterfeit money. CARDONICK surmised that his occasional summer meetings for drinking and socializing, however casual and brief, created a bond of trust.between the two which lasted, unnourished, for over a decade. Thus, at their very first meeting in 1972, according to CARDONICK'S recollection, the Petitioner suggested that he would sell counterfeit Federal Reserve Notes in lots of $50,000.00 exclusively through his chum, CARDONICK (N.T. 116).

The informant testified to being shocked at the illicit proposition made by his new probation counselor at their first meeting (N.T. 199). Never-

theless, CARDONICK had realized years before that people inexplicably sought him out with their nefarious propositions; therefore, the informant followed his usual custom and reported the Petitioner's suggestion to Special Agent FRANCIS McDONNELL, United States Secret Service.

As soon as CARDONICK contacted the Secret Service, he was issued a microphone for concealment on his body along with an F.M. transmitter to permit the Secret Service surveillance vehicles to monitor and record future illicit conversations with ESPOSITO. Despite this sophisticated electronic equipment, the Government failed to make audible recordings of the allegedly

incriminating conversations in which he engaged the Petitioner on March 9th and on March 13, 1972, the evening of the actual counterfeit money sale for which the Petitioner was charged. In addition, the Government succeeded in making numerous clear, audible tape-recordings of telephone conversations involving the Petitioner and the Government informant; none of the audible recordings contained any incriminating statements.

CARDONICK did not fail altogether in producing tangible evidence of the Petitioner's guilt. On the evening of March 13, 1972, equipped with $2500.00 in genuine U.S. Currency provided by the Secret Service and wired with the same microphone which

produced the mandible tape recording of March 9th, CARDONICK met with the Petitioner, disappeared for two hours and returned in possession of the $25,000.00 in counterfeit currency.

Just what occurred during the two hours following the meeting between Petitioner and CARDONICK was the ultimate fact in contention at trial. CARDONICK claimed that ESPOSITO sold him the counterfeit money. ESPOSITO and his witnesses contended that CARDONICK'S stated purpose for the meeting on March 13, 1972 was to accompany the Petitioner to a South Philadelphia card game which ESPOSITO regularly participated in. ESPOSITO further contended that he per-

mitted CARDONICK'S prattle about counterfeit money because, as a probation officer, it was his job to monitor illicit activities engaged in those whom he was responsible for. Petitioner categorically denied the occurrence of any counterfeit money transaction. The only foil for certain was that the Secret Service never again saw the $2500.00 in genuine currency which it had entrusted to CARDONICK.

Weak as the prosecution's case was on its face, the evidence probative of guilt appeared even more tenuous after the credibility of the Government's chief witness was examined on cross-examination. CHARLES CARDONICK was revealed to be a professional infor-

mant whose success as a profiteer in the marketplace of justice was unparalleled. For over five years prior to his meeting with the Petitioner, CARDONICK had been a paid informant employed by the United States Secret Service (before that, he worked for the F.B.I. as an informant). During that entire time, he received incredible fees, generally in five figures, for each instance where he succeeded in arranging for the arrest and conviction of his partners in crime and, most assuredly, of those innocent individuals like the petitioner who found themselves inadvertently in proximity to CARDONICK'S schemes (N.T. 171-180). CARDONICK conceded

that he managed to support a very opulent life style with the money he raised both by engaging in illicit schemes and by informing on others (N.T. 183-186).

CARDONICK'S demonstrable lack of credibility, therefore, underscores the prime objection pressed by the Petitioner. For, at trial, there could be no doubt that the only convincing evidence of guilt could be found in tape recordings taken during the meeting between Petitioner and CARDONICK on March 13, 1972, at later meetings between the two, and during later telephone calls occurring up to April 13, 1972. In every case, the incriminating tapes played for the jury

were utterly inaudible. The court reporter certified (N.T. 234a) that he could not transcribe the calls because they were unintelligible. Similarly, members of the jury complained that they could not understand a word of the proffered tapes and complained that they would have to "guess" as to the words which they heard (N.T. 234). Still, the calls were played for the jury with the aid of "transcripts" prepared by the Government, to assist the jurors. Pre-trial objection to the accuracy of the transcripts was not permitted. Yet, even a cursory examination of one of the incriminating transcripts and comparison of its text with the tape

recording demonstrates clearly that the "transcripts" were prepared with utter disregard for accuracy by inserting literally fictional conversations, drafted to include very incriminating statements by the Petitioner, at the very points where the tapes were most inaudible (See particularly the comparison of the transcript of conversations involving Petitioner and CARDONICK on March 13, 1972 prepared by the Government and by Petitioner's counsel at pp. 39 to 44 infra.)

The jury was thus permitted to hear direct evidence of no probative value whatsoever - i.e., the tape recordings which both the jurors and the

Court reporter found unintelligible - and to guess whether that evidence was proof of the Petitioner's guilt - i.e., whether the conversations on the tape were accurately represented on the Government's transcript. Remarkably, the Third Curcuit Court of Appeals upheld this flagrant due process breach by reasoning that defendant's counsel could have submitted to the jurors a transcript of his own making, equally spurious as that proffered by the Government, with the hope that the jury would have seen fit to guess that the exculpatory version was true.

ARGUMENT

I. NONE OF THE AUTHORITY SUBMITTED BY THE LOWER COURTS OR THE GOVERNMENT ACTUALLY TOUCHES THE ISSUE HERE IN CONTENTION.

The Circuit Court of Appeals in its judgment order dated September 7, 1973 misconstrues the nature of the Petitioner's objection to the introduction of transcripts of tape recordings to the jury. The Petitioner does not now, nor did he then contend that transcripts of tape recordings may not be introduced to the jury for their convenience in following tape recorded conversations. Therefore, authority acted by the Circuit Court of Appeals and by the Government

dealing with the circumstances under which tape recordings and transcripts may properly be introduced to the jury is not relevant to the reason for which Petitioner here seeks certiorari review to the Supreme Court, see, e.g. Fountain -v- United States (5 Cir., 1967) 348 F.2d 624, Gonzales -v- United States (9 Cir., 1963) 314 F.2d 750, United States -v- Koska (2 Cir., 1967) 443 F.2d 1167, United States -v- Carson, (2 Cir., 1972) 464 F.2d 424, United States -v- Hall, 342 F.2d 849 (4 Cir., 1965), United States -v- Schanerman (3 Cir., 1945) 150 F.2d 941.

While conceding the complete propriety of introducing an accurate

transcript of recorded conversations

to the jury, Petitioner maintains:

> (1) that it is a denial of dire process to expose the jury to a transcript of recorded conversations where that transcript contains conversations inaudible under the precise conditions under which the recordings are to be presented to the jury.
>
> (2) that objections to the text of a transcript must be settled by a pre-trial hearing during which the trial court can strike any portions of the proffered transcript which do not reflect the audible portions of the tape recording and that introduction of such inaccurate transcripts subject to later cautionary instructions is an inherent denial of due process.

(3) that a prosecutor denies the defendant's right to a fair trial when he deliberately exposes the jury to transcripts of tape recordings which do not conform with the actual conversations audible to the jury when played in the courtroom.

II. THE GREATLY EXPANDED USE OF TAPE RECORDINGS NECESSITATED BY THE USE OF ELECTRONIC SURVEILLANCE UNDER TITLE III OF THE 1968 OMNIBUS CRIME CONTROL AND SAFE STREETS ACT MAKES IT IMPERATIVE FOR THIS COURT TO SET STRICT GUIDELINES INSURING THE FAIR USE OF SUCH MATERIAL.

The Administrative Office of the United States Courts have reported that during 1972, no less than 816 authorized wiretaps and 228 extensions of taps were conducted. In every case, the objective of these

wiretaps was to yield tape recorded evidence for production in Court.

III. IT IS A DENIAL OF DUE PROCESS TO EXPOSE THE JURY TO A TRANSCRIPT OF RECORDED CONVERSATIONS WHERE THAT TRANSCRIPT CONTAINS CONVERSATIONS INAUDIBLE UNDER THE PRECISE CONDITIONS UNDER WHICH THE RECORDINGS ARE TO BE PRESENTED TO THE JURY.

This Court made clear in United States -v- Leary, 395 U.S. 6 (1969) that permitting a factfinder to make an evidentiary inference where the fact inferred is not at least more likely than not to result from the fact upon which the inference is based constitutes a denial of due process. Here, the jury is permitted to infer that utterly inaudible tape recordings, in fact, contain the

by a Secret Service Agent with no special expertise in decipering tapes and using no special process to make thetapes more intelligible. Plainly stated, it would be irrational for a jury listening to recordings which they cannot understand to infer that the recordings contain the words on a transcript before them.

IV. OBJECTIONS TO THE TEXT OF A TRANSCRIPT MUST BE SETTLED BY A PRE-TRIAL HEARING DURING WHICH THE TRIAL COURT CAN STRIKE ANY PORTIONS OF THE PROFFERED TRANSCRIPT WHICH DO NOT REFLECT THE AUDIBLE PORTIONS OF THE TAPE RECORDING AND INTRODUCTION OF SUCH INACCURATE TRANSCRIPTS SUBJECT TO LATER CAUTIONARY INSTRUCTIONS IS AN INHERENT DENIAL OF DUE PROCESS

Introduction of highly in-

flammatory and inculpatory transcripts of tape recordings which are manifestly inaudible when played at trial is precisely analagous to the case of admission of a confession by a co-defendant subject to later cautionary instructions that the jury disregard such statement. In both instances, there is a denial of due process. Brtuon -v- United States, 391 U.S. 123 (1968).

V. A PROSECUTOR DENIES THE DEFENDANT'S RIGHT TO A FAIR TRIAL WHEN HE DELIBERATELY EXPOSES THE JURY TO TRANSCRIPTS OF TAPE RECORDINGS WHICH DO NOT CONFORM WITH THE ACTUAL CONVERSATIONS AUDIBLE TO THE JURY WHEN PLAYED IN THE COURTROOM.

Introduction into evidence of tape recordings which the prosecutor knows do not conform to the recorded conversations which will be audible to the factfinder is a violation of due process guidelines enunciated in Brady -v- Maryland, 373 U.S. 83 (1963).

Robert F. Simone

ROBERT F. SIMONE

JAMES T. VERNILE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNA.

UNITED STATES OF AMERICA

-v- : CRIMINAL NO. 72-348

JOSEPH ESPOSITO

O R D E R

AND NOW, to wit, this 12th day of March, 1973, it is Ordered that the Defendant's Motion for Judgment of Acquittal after guilty verdict or, in the alternative, for a New Trial, be and the same is hereby DENIED.

AND IT IS SO ORDERED.

/s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1285

UNITED STATES OF AMERICA

-v-

JOSEPH ESPOSITO,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted under 3rd Cir. Rule 12(6)
September 5, 1973

Before HASTIE, VAN DUSEN & GIBBONS,
Circuit Judges

Allen T. Newman, Esq. and
Morton Krase, Esq.,
Phila., Pa.,
Attorneys for Appellant

Robert E.J. Curran, United States Attorney, and Thomas A. Bergstrom, Special Attorney, U.S. Department of Justice, Phila., Pa.
Attorneys for Appellee

JUDGMENT ORDER

After consideration of (A) the contentions of defendant that

(1) the admission of conversations between the Government informant (Cardonick) and the defendant relating to possible criminal activity to be performed in the future and dealing with the sale of counterfeit currency, all taking place after the date of the offense (March 13, 1972), as set forth in the indictment, was prejudicial and reversible error.[1]

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1. The conversations recorded subsequent to the date of the offense were properly admissible to show intent, plan scheme or design. See U.S. -v- Carter, 401 F.2d 748, 749-50 (3d.Cir.1968), cert. denied, 393 U.S.904 (1969); U.S. -v- Prince, 264 F.2d 850,853 (1959);U.S. -v- Stirone, 262 F.2d 571, 576-77 (3d.Cir. 1959).

(2) the admission of testimony regarding the similarity in printing between the counterfeit money allegedly transferred by the defendant and counter feit money printed by Surace, a printer of counterfeit money, and testimony regarding a seizure of counterfeit money at an airport was prejudicial and reversible error,[2]

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2. See Brief of appellant at pp.15-16. The testimony concerning Surace and the printing of counterfeit money (see N.T. 87-88,275-78) was properly admitted to explain matters injected into the record by defense counsel on the cross-examination of Agent McDonnell (see N.T.83-84). Similarly, the testimony concerning the seizure of counterfeit money at the airport (see N.T. 279-81) was properly admitted to corroborate the testimony of the Government informant (Cardonick) on matters injected into the record by defense counsel in cross-examination of Cardonick (see N.T. 198-99).

(3) the reading by the jury of the written interpretations prepared by Secret Service Agent McDonnell of the inaudible portions of the taped conversations between the Government informant (Cardonick) and the defendant, without a hearing by the court to determine the intelligibility of the taped recording, was highly inflammatory, prejdicial, and reversible error.[3]

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3. Admission of the transcripts of inaudible portions of the recorded conversations was not prejudicial error since the agent who prepared the transcripts testified at trial and was subject to cross-examination concerning his interpretation of the conversations the defendant could have introduced his own transcribed version of the conversations, and the trial judge gave appropriate cautionary instructions concerning the accuracy of the transcripts. See U.S. -v- Hall, 342 F.2d849,852 (4th Cir.1965).In so holding, we do not intimate any criticism of a different procedure of making a preliminary determination of admissibility of a transcript as done in U.S. -v- Lawson, 347 F.Supp. 144,147-50 (E.D.Pa. 1972).

(B) the briefs of counsel; and (C) the record,

It is ORDERED AND ADJUDGED that the district court judgment of March 26, 1973, is affirmed.

BY THE COURT,

/s/ Van Dusen
Circuit Judge

Dated: Sept. 7, 1973

ATTEST:

Clerk /s/ Thomas Quinn

SECRET SERVICE TRANSCRIPT OF CONVERSATION
NO. 10
3/13/72 7:00 P.M.
(Prepared by S. A. McDonnell)

Conversation 10

106-173

Informant	Could this be him
Informant	School Southern High
Informant	Is this guy coming over here inaudible
Esposito	Who's that?
Informant	He works for me.
Esposito	No good. Drop him off somewhere. No obscene good.
Informant	What do you want me to do. You got a car here. Don't you have a car.
Esposito	No
Informant	I'll make him wait on the corner
Esposito	Now wait. Yo spoofed me Charl. It's my obscene life; I'm laying on the line.

Informant	He's the kid that was with me the day we were together.
Esposito	Its a twenty year rap. That's no obscene obscene.
Esposito	I want a use your car; you know inaudible portion
Informant	You tell me; whatever you want me to do.
Esposito	Inaudible portion
Informant	He works. You know the kid.
Esposito	Its not that Charl. inaudible You understand what I mean. And anyway if you are doing something with the law, which I am not saying you are. But listen if you are. There's really no bust for me. It's only me and you. You know what I mean. Just like for you, it ain't no bust for you, if anything happens, that's what I'm saying; I'm scared to (obscene)

	death, Charl. What'd think I'm stalling for; I got the stuff. I got it a long time. I'm a nervous obscene wreck over here.
Informant	Allright, what want me to do, you want me to tell him to wait here or what. I'll come back and get him.
Esposito	It might be like a half hour. He ain't going nowhere, I just want to make things all right.
Informant	OK
Informant	Wait here. OK?
SA Chacos	Yea.
Informant	No. On the corner. I'll be back.
	Inaudible
Esposito	Drive around for awhile
Informant	Drive around
Esposito	I hope aint spooking you, but I scared to (obscene) death. They want it bad.

Informant	So what all do you have. How many numbers?
Informant	He's real careful and I'll be back in around fifteen minutes. Why don't you get some coffee, because I'm going to be at 17th and Snyder at a gas station. OK.
SA Chacos	Alright

TRANSCRIPT OF CONVERSATION # 10
Prepared by Petitioner's Counsel
from copy of Government Tape

(Reproduced on Jack-to-Jack Hook-up)

Could this be him?

(Inaudible noise)

high .... noise

here.....noise

alright....noise

this one.....noise

Oh, good, ...noise

car here,.....noise

car.....noise

car.....noise

what.....noise

Charl.....noise

What do you want to do? Do you wanna tell him to wait here or what? ....noise
it's just that .....noise

I know,.....noise

Wait a minute, wait here.....noise

Alright,.....noise

I'll be back.....noise

Charl, hold on.....noise

you.....noise

here he comes.....noise

what's goin on.....noise

Call me back in about 15 minutes.....
noise.
All right, Charl....noise
Total time: 7 minutes, 20 seconds

Total words: 67 words

AFFIDAVIT OF SERVICE

I, JAMES T. VERNILE, on November 5, 1973 served three copies of Petition for Certiorari on Solicitor General, Department of Justice, Washington, D.C.. and one copy on Thomas Bergstrom, Esq. and Jeffrey M. Miller, Esq. Assistant United States Attorneys, United States Court House, 9th and Chestnut Streets, Philadelphia, Pennsylvania, by First Class Mail, Certified, Return Receipt Requested.

James T. Vernile

JAMES T. VERNILE

Sworn to and Subscribed:
before me this, 5th day:
of November, 1973:

Marianne Nicoli

Notary Public

Notary Public, Philadelphia, Philadelphia Co.

No. 73-737

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH ESPOSITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-737

JOSEPH ESPOSITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that electronic recordings, which he now claims were largely unintelligible, should not have been admitted at trial, and that transcripts of the recordings should not have been given to the jurors.

1. After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of possession and sale of counterfeit United States currency, in violation of 18

U.S.C. 472 and 473. He was sentenced to imprisonment for three years. The court of appeals affirmed on September 7, 1973 (Pet. App. 34-38).

In early March 1972, Cardonick, a probationer for a state offense who was also a paid informant for the government, was asked by petitioner, an old acquaintance who had become his probation officer, whether he was interested in purchasing counterfeit currency. Petitioner stated that he had access to such currency, which could be purchased for ten percent of its face value. Cardonick reported this conversation to Secret Service Agent McDonnell, who instructed him to accept the offer. Cardonick consented to the use of electronic devices for the monitoring of his conversations with petitioner (Tr. 111-119, 58-59).[1] On the morning of March 9, Cardonick, equipped with such a device, met petitioner and agreed to buy $25,000 in counterfeit currency (Tr. 127-129).

On March 13, Cardonick, accompanied by agent Chacos, met petitioner at the corner of Broad and Snyder in Philadelphia (Tr. 131-138). When petitioner saw Chacos with Cardonick, he told Cardonick to go to another location, where the transfer took place. Cardonick returned to Chacos with the $25,000 in counterfeit currency (Tr. 131-147). The movements of Cardonick and petitioner were observed

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[1] "Tr." refers to the trial transcript, which we are lodging with the Court.

by other agents (Tr. 256-261, 262-265, 266-271, 300-309).[2]

Approximately 35 conversations between petitioner and Cardonick were recorded between March 9 and March 23, 1972 (Tr. 49, 100). Some of these were monitored by devices placed on Cardonick's person, others by devices placed in his automobile and on telephones used by him, all with his consent (Tr. 27-28, 48-50). At times, conversations were inaudible to the officers and could not be recorded (Tr. 22-26). The recordings that were made were later transferred to a master tape and introduced in evidence (Tr. 29, 38, 42-45, 50-55, 94-95, 100).

Petitioner's contention that the recordings were "utterly inaudible" (Pet. 22) is unsupported by the record. Petitioner's sole objections at the pre-trial conference were that the tape contained prejudicial matter relating to illegalities in the sale of cigarettes and that taped conversations occurring after the alleged transfer of counterfeit money on March 13 were irrelevant (Tr. 2-10). Although petitioner now contends that the trial court should have compared the tape and the transcript before trial, no such request was made at that time. Indeed, no claim was made that the tape was unintelligible or that the transcript thereof was inaccurate.

On the morning of the second day of trial, the court announced that it had read the transcript of

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[2] No arrest was made at the time, to protect the investigation concerning the source of the counterfeit currency (Tr. 87-88).

the tape and had found nothing which should be excluded except the references to cigarettes (Tr. 100-101). The court then stated that copies of the transcript might be supplied to the jury in order to avoid confusion as to who the speakers were (Tr. 102-103).[3] Petitioner objected that it was "perfectly clear from listening to the tape that the people identify themselves" (Tr. 105). When the court disagreed with this observation, counsel responded (Tr. 106):

> This is for the jury to consider. If the jury can't understand who the parties are or what is being said, we can stop the tape and make the identities known.
>
> * * * *
>
> I think Your Honor can only rule upon this by listening to the tapes and hearing for yourself whether or not you feel the jury would not be able to know what is going on, who is talking or whether or not the tapes are intelligible.

The court overruled petitioner's objection because it believed that the use of the transcript would aid in identifying the speakers. The court stated, however, that it would instruct the jury, as counsel requested, that the transcript was "simply the interpretation of the recording by Mr. McDonnell who has testified that he prepared the transcript and if their hearing of the tape differs in any fashion from what the transcript says, it is their hearing that determines what the conversation was on the tape" (Tr. 108). That instruction was given both at the time

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[3] The transcripts were not available to the jury during their deliberations.

the transcript was given to the jury (Tr. 124-125) and again in the charge (Tr. 517).

When the master tape combining all the various recordings was introduced in evidence during the testimony of Cardonick, the only objection made was that there had been an insufficient showing of consent to the recording (Tr. 122). Thereafter, as the testimony of Cardonick unfolded, various portions of the tape were played while the jury followed corresponding portions of the transcript. Cardonick testified that the transcript accurately reflected the various conversations (Tr. 123-125, 134-135, 136, 141, 151, 154-155, 156-157, 159-161). During cross-examination of Cardonick, the defense played portions of the tape concerning eight other conversations (Tr. 228-234). Transcripts to identify the participants in those conversations were not furnished, leading one juror to object to their absence, to which petitioner's counsel responded: "Perhaps they should have a transcript of that." The court said that would be up to counsel, whereupon counsel read from the transcript (Tr. 234-239).

2. Petitioner asserts, without citation to the record, that "[i]n every case, the incriminating tapes played for the jury were utterly inaudible" (Pet. 21-22). This claim is based upon a "Reporter's Note" contained on a loose sheet in volume I of the trial transcript,[4] and an interpretation placed upon the juror's

[4] The reporter's note states:

> The portions of the record relating to the playing of the recorded conversations have not been transcribed

complaint, *supra*, during cross-examination of government witness Cardonick.[5] No objection was made at trial that the transcript prepared by Agent McDonnell was inaccurate or that the recording was so inaudible that it furnished no basis for the transcript. Pursuant to Rule 16, Fed. R. Crim. P., the tapes were furnished to defense counsel for a sufficient time prior to trial to permit transcription, so that he could at trial have pointed to any instance in which Agent McDonnell's transcription was inaccurate. Petitioner did not do so then, when the tapes were available for comparison. He should not be permitted to do so now.

Nor is there basis for the assertion, again without citation to the record, that "[p]re-trial objection to the accuracy of the transcript was not permitted" (Pet. 22). Indeed, even at trial when defense counsel suggested the court should listen to the tape, there was no suggestion that this was appropriate because the transcript might be inaccurate; the contention was instead that the judge could then conclude that the tapes were so clear that no transcript was necessary (Tr. 106).

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because the Reporter was unable to make an intelligible transcript of the same.

The fact that the Reporter did not attempt to transcribe a word for word record from a single hearing of the tape does not, of course, indicate that it was so inaudible as to be unintelligible.

[5] The juror's complaint seems to have been directed to the difficulty in identifying the speakers without an accompanying transcript. Counsel then acknowledged that the transcript would be helpful and read several pages therefrom, without indicating any reservations about its accuracy.

In view of the lack of objection below to any portion of the transcript as inaccurate or to the tape itself as unintelligible, and the court's careful instructions both at the time the transcript was admitted and in its charge, there was no abuse of the trial court's discretion. The tape was properly received in evidence, and the transcript thereof was properly allowed to be used as an aid in listening to it. See *Fountain* v. *United States*, 384 F.2d 624, 631-632 (C.A. 5), certiorari denied *sub nom. Marshall* v. *United States*, 390 U.S. 1005; *United States* v. *Carson*, 464 F.2d 424, 436-437 (C.A. 2); *United States* v. *Hall*, 342 F.2d 849, 852-853 (C.A. 4); *United States* v. *Weiser*, 428 F.2d 932, 937 (C.A. 2), certiorari denied, 402 U.S. 949.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[6] Even if the tape was not entirely clear, the use of the transcript was appropriate to avoid the necessity of playing the tape several times to assure that it was properly understood. See *United States* v. *Lawson*, 347 F. Supp. 144, 148 (E.D. Pa.). Even where approximately half of a taped conversation was found to be inaudible, a transcript of the audible portions was held to have been properly admitted. *Addison* v. *United States*, 317 F.2d 808, 815 (C.A. 5), certiorari denied, 376 U.S. 905.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 532618 187